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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 747.

VIRGIL HERDMAN,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED FOR REVIEW.

In an action to recover damages for personal injuries allegedly sustained when a train made an emergency stop where there is a total failure by plaintiff to establish that the stop was caused by defendant's negligence, can plain-

tiff rely upon the doctrine of *res ipsa loquitur* when his own positive, uncontradicted proof is that (1) the train was stopped to avoid striking an automobile at a grade crossing and (2) that in the ordinary course of things emergency stops are necessary from time to time, that in his experience as a railroader plaintiff had experienced such emergency stops many times, that they must be expected and there is nothing that can be done about it?

STATEMENT OF THE CASE.

On February 1, 1951, the petitioner, plaintiff in the original action, was performing his regular duties as a conductor on respondent's freight train and, as conductor, was in charge of such train. The train was proceeding at a slow rate of speed (R. 17a) on the main line of the railroad through a congested area in the city of Dayton, Ohio. It was a cold, winter day with snow blowing in the air (R. 42a). As the train approached a grade crossing of a public street at about 3:00 p. m., the train went into an emergency braking situation. Petitioner alleges that, because of the stop, he was thrown against a table and onto the floor of the caboose in which he was riding. Because the air immediately came back in the train line, petitioner knew that there was no defect in the train. The train proceeded on its journey. When the train made a scheduled stop three miles down the line, petitioner went up to the locomotive where the engineer told him that he had made the emergency stop to avoid striking a load of school children in an automobile that had come onto the tracks at the crossing (R. 46a).

The day following these events petitioner made and filed a report (Defendant's Ex. A; R. 42a to 45a) as he was required to do in his capacity as conductor, which report

he gave to appellee's trainmaster and in which he described the incident herein involved and the reason for the emergency stop. That report, known as a CT 75 A, was made and signed by petitioner and reads in part as follows:

> "CN 28 Enginer 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile, engineman applied air in emergency causing rough stop."

Petitioner testified that he has known of emergency applications of brakes "many times" (R. 50a, 51a) and that "We got to expect them or think about them" (R. 53a). In response to a question made at the taking of petitioner's deposition with respect to whether petitioner had ever ridden in a caboose before when there was an emergency application of steam, petitioner replied, "Many times" (R. 50a) and further, that you have to expect an emergency stop at all times and there is nothing that can be done about it (R. 52a).

Petitioner's action was commenced in the District Court of the United States for the Southern District of Ohio, Eastern Division, which court sustained the motion of respondent for directed verdict at the close of petitioner's case. The decision of the District Court was reviewed by and argued in the United States Court of Appeals for the Sixth Circuit, which court unanimously affirmed the action of the District Court. The order of the Court of Appeals was entered on the thirteenth day of December, 1955, and stated in part:

> "We think the district judge performed his duty in directing a verdict for the appellee. There was 'a complete absence of probative facts to support the conclusion' of negligence, Lavender v. Kurn, 327 U. S. 645 (1946). And negligence remains the sole basis of

liability under the Federal Employer's Liability Act. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1943).

The judgment is affirmed."

Your respondent observes that in petitioner's statement of the case (page 5 of the petition) petitioner indicates that never in his experience had previous sudden stoppings of the train been as disastrous as this time. We submit that proof of record lends no support to this allegation. And, at page 6 of his petition, it is indicated that petitioner "at a later date, while suffering pain from his injuries, signed a report prepared and written by some other employee of the respondent." We are constrained to point out that the report in question was made and signed by petitioner the day following the events complained of while his memory was fresh (R. 43a) and that it was his duty as conductor to make such reports (R. 53a). Nor does the record lend support to the allegation that petitioner was suffering pain at the time this report was made.

STATUTES INVOLVED.

Petitioner based his amended complaint upon the Federal Employer's Liability Act. The proceedings below raise no issue regarding the meaning, extent or applicability of that act to this case other than the fact that that Act establishes negligence as the sole basis of liability. Because there was a total failure to establish negligence, the District Court directed a verdict for respondent. That action was unanimously affirmed by the Sixth Circuit Court of Appeals.

ARGUMENT.

I.

Negligence is the Sole Basis for Liability.

Congress, in enacting the Federal Employer's Liability Act, established negligence of the employer as the basis for any recovery by employees in cases where the Act might apply. This is supported by numerous decisions. In *Fantini v. Reading Co.*, 147 F. 2nd, 543, a directed verdict case, the Third Circuit Court of Appeals stated in part:

> "The right of action conferred by the Federal Employer's Liability Act rests upon requisite proof of the employer's negligence as to the proximate cause of the employee's injury or death."

Because of his total failure to meet this burden of proof, petitioner has sought to save his case by the application of the doctrine of *res ipsa loquitur*.

II.

The Doctrine of Res Ipsa Loquitur Has No Application.

The decisions of this court, the various circuit and state courts have established that the doctrine of *res ipsa loquitur* has no application in a case unless, at least, all four of the conditions hereinafter noted are met:

A. The Accident Must Have Been One Which Would Not Happen in the Ordinary Course of Events if Those Who Had the Management or Control Had Exercised Proper Care. *San Juan Light & Transit Co. v. Requena*, 224 U. S., 89 (1912).

This condition for application of the doctrine has not been met because petitioner's own evidence indicates that the suddent stopping of a train actually does occur in the ordinary operation of a railroad (R. 52a), that petitioner has known of emergency applications of brakes "many times" (R. 50a), that it must be expected at all times (R. 52a), and that an emergency application of brakes must be expected when an engineer is confronted with an emergency such as he was in this case (R. 52a).

The train on which petitioner was riding was brought to an emergency stop to prevent striking an automobile at a grade crossing. Under these facts the trial court correctly decided that this was not the sort of accident or situation in which the doctrine of *res ipsa loquitur* applies. We refer to a portion of the opinion of the trial court, wherein the court stated as follows:

> "Whether or not a case is one to which the doctrine of *res ipsa loquitur* applies is a question of law for the judge to decide. So, I have decided in this case that this is not the sort of accident or situation in

which the doctrine of *res ipsa loquitur* applies. In order for it to be such a case, it would have to be a situation, a set of facts where the accident happened is something that would not happen in the ordinary course of events. In this case, it would have to be that an emergency stop would not happen in the ordinary course of operating a railroad.

The plaintiff has testified in this case, that he has been in a caboose some five, six or seven times, at least when an emergency stop was made and that you always have to expect an emergency stop to be made, and that there isn't anything that you can do about it." (R. 58a)

It is pure self-contradiction for petitioner, after his own testimony together with the common experience of men, now to contend that emergency stops do not happen in the ordinary course of operating a railroad. The law cannot and should not justify the proposition that if an emergency stop is made by an engineer operating a railroad train, that engineer and his master are presumed to be negligent in law.

> "In the final analysis, each case seeking to invoke the doctrine must stand or fall upon its own facts. *Res ipsa loquitur* is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience." *Williams v. United States,* 218 F. 2nd, 473, 476 (5 C.C.A.)

Human experience in cases such as the one at bar compels the conclusion that negligence is not to be inferred by reason of a mere emergency stopping of a train. It is not to be inferred in the instant case.

Res ipsa loquitur also cannot be applied unless:

B. The Accident Must Have Happened Under Circumstances Which Leave No Reasonable Conclusion Other Than Negligence of Defendant. *Lucid v. DuPont*, 199 F., 377 (9 C.C.A.); *Dierks Lumber & Coal Co. v. Brown*, 19 F. 2nd, 732 (8 C.C.A.).

This condition is not present in the instant case.

> "The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others." *Lucid v. DuPont* (supra).

The evidence in this case does not support any inference of negligence on the part of respondent. Petitioner admits having made (R. 42a) and signed (R. 43a) a report known as a CT 75 A (Defendant's Ex. A; R. 42a to 45a) which report he was required to file as conductor and employee in charge of respondent's train. This report is quoted in respondent's statement herein and indicates the reason for the emergency stop, to-wit, to prevent striking an automobile at a crossing. Petitioner admits that the engineer of the train told him that there was a load of school children in an automobile and he stopped to avoid striking that automobile (R. 46a). We submit that such action on the part of respondent's engineer, far from being a failure to exercise "proper management and control," rather, epitomized due care in the premises. See *Canton Motor Coach, Inc. v. Hall*, 46 Ohio App., 516. Thus, evidence adduced in petitioner's own case not only dismisses negligence as a reasonable conclusion, but completely destroys any plausible argument for the application of the doctrine of *res ipsa loquitur*. The law in Ohio is stated in

the second syllabus of *Krupar v. Procter & Gamble Co.*, 160 Ohio St., 489 (1954):

> "2. In a negligence action if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant. (Paragraph three of the syllabus in the case of Gedra v. Dallmer Co., 153 Ohio St. 258, approved and followed.)"

Res ipsa loquitur also cannot be applied unless:

C. The Knowledge of How the Occurrence Happened Must Be Peculiarly Within the Knowledge of Defendant. *Terminal R. Assn. of St. Louis v. Staengel*, 122 F. 2nd, 271 (8 C.C.A.).

The cause of the sudden stopping of respondent's train was known to the petitioner. In fact, it was his report to the respondent, which it was his duty to make, that advised respondent of the stopping and the reason therefor. Hence, the doctrine is not available. We quote from 65 *C. J. S.*, 1002, Negligence, Sec. 220 (6):

> "Although * * * the doctrine of *res ipsa loquitur* provides a substitute for direct proof of negligence, the rule is nevertheless one of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available. Hence, the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear."

And, commenting on the doctrine in a separate opinion in *Johnson v. United States*, 333 U. S., 46, Mr. Justice Frank-

furter stated at page 53, "It is, after all, a rule of necessity to be invoked only when necessary evidence is absent and not readily available."

The evidence in the instant case is not absent, but rather is in the record as a product of petitioner's own case in chief.

Nor can the doctrine apply unless:

D. The Instrumentality Causing the Injury Must Have Been in the Exclusive Control of Defendant. *Smith v. Baltimore & O. R. Co.*, 204 F. 2nd, 162 (6 C.C.A.).

The events of which petitioner complains occurred in a well built up area in the city of Dayton, Ohio (R. 26a), on a cold winter day with the snow blowing (R. 42a) and at a "crossing just east of Dayton Rubber Works" (R. 45a), on the main line of respondent's railroad, and on a regular run from Richmond, Indiana to Columbus, Ohio. The instrumentality proximately causing the alleged injuries was an automobile on a public highway—a situation completely out of and apart from respondent's control.

In the recent case of *Smith v. Baltimore & O. R. Co.*, 204 F. 2nd, 162, the Sixth Circuit Court of Appeals, which affirmed the decision of the District Court in the instant case, held that the doctrine of *res ipsa loquitur* had no application to a case in which defendant's train collided with a tractor-trailer at a grade crossing, resulting in the death of a brakeman, for the reason that the tractor-trailer which collided with the locomotive was not under the control of defendant. This court denied certiorari in 346 U. S., 838. Similarly, respondent in the instant case had no control over the automobile on the crossing which created an emergency and resulted in the sudden stopping here.

III.

Cases Cited by Petitioner Distinguished.

Petitioner relies heavily on the case of *Zumwalt v. Gardner*, 160 F. 2nd, 298, in which plaintiff, a switchman, attempted to board a switch engine when the engine, for some unknown reason, went into an emergency stop and jarred plaintiff off backwards. The court stated at page 302:

> "This occurrence and the circumstances surrounding it furnished evidence from which the jury might have inferred negligence which if not explained or not explained satisfactorily would have supported a verdict for plaintiff. We do not mean by this that this evidence compelled a verdict for plaintiff, but only that it would have warranted such a verdict."

The instant case is to be distinguished in that the reason for the emergency stop is in evidence and is known to this petitioner. In the *Zumwalt* case, some of the testimony was in conflict with admitted physical facts and one of the grounds pleaded was based on the Safety Appliance Act. Neither of these factors are present in the instant case.

Petitioner several times mentions that the train in question was moving within respondent's yard limits. As we commented in the next preceding section herein, regarding the instrumentality and its exclusive control, the events of which petitioner complains occurred at a public highway crossing in a congested area in Dayton, Ohio. This most certainly must be distinguished from situations in which the sudden stopping occurs in a switching operation in the switch yards of a railroad wherein the railroad maintains control over the entire area.

Petitioner also seeks support from the case of *Chesapeake & Ohio Ry. Co. v. Smith*, 42 F. 2nd. 111. There, the

evidence showed that defendant's train was sent down the wrong track through the negligence of the head brakeman in throwing the wrong switch in defendant's switching yards and that after it had proceeded but eight car lengths it came to a sudden stop. The court stated at page 114:

> "But, in view of the brakeman's initial mistake, the violence of the stopping, the fact that the accident occurred in broad daylight, *and the complete absence of any evidence of such a sudden emergency, there seems to be no outstanding probable cause of the accident other than defendant's negligence.*". (Emphasis ours.)

In the case at bar there is no evidence of an "initial mistake" and in the record, rather than "complete absence", there is proof of the emergency and the reason why the engineer, in the exercise of due diligence, stopped the train.

Passenger cases cited by petitioner are likewise distinguishable in that, "a carrier for hire owes to a passenger the highest degree of care known to the law, whereas the interstate carrier owes to the employee only what we call ordinary care * * *" *Cochran v. Pittsburgh & L. E. R. Co.*, 31 F. 2nd, 769, 773 (6 C.C.A.).

IV.

Petitioner Has Failed to State a Case for Writ of Certiorari.

The decision of the Court of Appeals below does not, as petitioner suggests, establish a conflict of authority. And most certainly the court did not say, nor is it the contention of this respondent, that the doctrine of *res ipsa loquitur* is not applicable to actions under the Federal Employer's Liability Act. Nor can we in any way agree with petitioner wherein he concludes that the effect of the decision of the Sixth Circuit Court of Appeals in this case is to wipe out the doctrine in the Sixth Circuit. Manifestly, this is

not true. The record merely establishes that (1) this case is not one for application of the doctrine, and (2) whatever argument there might have been for the application of the doctrine is destroyed by evidence in petitioner's own case in chief.

Petitioner quotes in his petition (p. 10) from *Sweeney v. Erving*, 228 U. S., 233. This decision was amplified and explained in *Gray v. B. & O. R. Co.*, 24 F. 2nd, 671 (7 C.C.A.), wherein the court after quoting from the *Sweeney* case stated:

> "Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury,' the court meant that unexplained, the facts made a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, 'it is evidence to be weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'
>
> "If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury, such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, where the Court restated a well known rule: 'The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and shall be directed for the other party' * * *"

Did the trial court abuse his judicial discretion in directing a verdict for respondent? This is the question petitioner should be asking—not whether the doctrine of *res ipsa loquitur* applies in the premises.

The doctrine, if it did apply, does not preclude the court's directing a verdict for respondent. *Dierks Lumber & Coal*

Co. v. Brown, 19 F. 2nd, 732 (8 C.C.A.); *Terminal R. Assn. of St. Louis v. Staengel,* 122 F. 2nd, 271 (8 C.C.A.). For, as this court has stated, the doctrine *does not* avoid the requirement that upon the whole case, petitioner must prove a breach of the duty of due care by a preponderance of the evidence. *Commercial Molasses Corp. v. New York T. B. Corporation,* 314 U. S., 104 (1941). The trial judge heard the facts and drew the following conclusion in his statement to the jury:

> "Now, for the plaintiff to recover against the defendant in this case, he must show negligence against the defendant; that is, he must show that he was injured through the negligence of the defendant acting through some of its employees. I think, as may have been said to you on your voir dire examination, that this is not a situation like we have in Ohio, under the Workman's Compensation Law, where all a person has to do is to show that he was injured while in the performance of his duties. This case comes under a federal law, that is, a law passed by the Congress of the United States, and its only provision is that an employee who is injured may recover against the defendant for the negligence of the defendant, And so, the court comes to the conclusion that this is not the sort of case where negligence may be inferred and there is no proof of negligence." (App., 58A-59A.)

The entire case was reviewed and heard on the briefs and oral argument by the Sixth Circuit Court of Appeals. That court unanimously affirmed the action of the District Court judge. Respondent resolutely submits that this is not a case for the granting of a writ of certiorari. Two courts have concurred in their views of the case and petitioner has failed to bring himself within Rule 19 of the Rules of the Supreme Court of the United States, which indicates the considerations which govern review on certiorari. We refer to the separate opinion of Mr. Justice

Roberts, in the case of *Bailey v. Central Vermont R. Co.*, 319 U. S., 350 (1942), quoting in part at page 358:

> "It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. I merely state my conviction that the Seventh Amendment envisages trial not by jury, but by court and jury, according to the view of the common law, and that federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reason. But this I do say, that this court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government."

Manifestly, this court should not sit in review of lower courts which have properly applied the well established and settled law.

CONCLUSION.

In conclusion, it is submitted that the decision of the Court of Appeals affirming the District Court in this case is entirely in accordance with the controlling decisions of this court as well as the controlling decisions of other courts of appeals hereinabove cited.

The district judge did not violate judicial discretion in directing a verdict for respondent under the facts and evidence presented. Concomitantly, there is no irreconcilable conflict between the circuits as a result of the affirmance by the Court of Appeals below. Petitioner has failed to state a sufficient cause to merit further consideration by this court on writ of certiorari.

Wherefore, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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